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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/773,160
Filing Date: February 09, 2004
Appellant(s): COATES, FREDRICA V.

Robert W. Pitts
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 5-4-10 appealing from the Office action mailed 12-4-09.

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:

Claims 20-22, 24-27, 29-31 and 34.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN

REJECTIONS.” New grounds of rejection (if any) are provided under the subheading “NEW GROUNDS OF REJECTION.”

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant’s brief.

(8) Evidence Relied Upon

2,691,983	BERNARD	10-1954
5,843,065	WYANT	12-1998
5,772,649	SIUDZINSKI	06-1998
4,892,598	STEVENS et al.	01-1990
3,049,124	THOMPSON	08-1962
1,977,604	ALSOP	10-1934
5,360,422	BROWNLEE et al.	11-1994

Enlargement of Figure 9 of U.S. 2,691,983 to BERNARD, attached as Appendix A.

Definition of "displaced", Merriam-Webster OnLine

9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Ground 1:

Claims 20-22, 24-27, 29-31 and 34 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 20-22, 24-27, 29-31 and 34 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 20 is considered to be representative of such claims.

A positive structural antecedent basis for “the stitches joining...around the entire periphery of the anchor layer” (last section, first three lines of claim 20) should be set forth.

Grounds 2-5:

Claim Language Interpretation

No claim terminology has been explicitly defined. Therefore the claim terminology will be interpreted according to its usual, e.g., dictionary, definition. It is noted that the language of claim 20, lines 7-8 is interpreted to require non-monolithically formed layers. It is further noted that such is considered to recite the same structure as previously presented on lines 3-7. With regard the terminology “displaced”, see definition provided on PTO-892. The terminology “adjacent” as defined by the dictionary is “Close to, lying near”. Therefore, it is noted that the terminology “adjacent”, absent claiming of specific distances, is considered relative. Claim 34 is still considered a product by process claims, see MPEP 2113, i.e. “[E]ven though product- by- process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different

process." In re Thorpe, 777 F.2d 695,698, 227 USPQ 964, 966 (Fed. Cir. 1985) (citations omitted). Additionally note that claim 34 does not explicitly claim how the remaining sides are stitched to form the pocket, e.g. does not require direct stitching of the cut edges of the sides formed by cutting the triangular portions. Therefore the end product of claim 34 is considered a pocket with sides that have been stitched together in some manner and an outer edge having an elastic strip covering it.

Grounds 2-5, see page 8 of the Brief, second to fifth full paragraphs, as well as the claims of all such Grounds are treated as a Group by Appellant, see page 9 of Brief (Note 37 CFR 41.37(c)(1)(vii), i.e. Each ground of rejection must be treated under a separate heading. Any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Ground 2 is considered to be representative of such respective grounds of rejection and claim 20 is considered to be representative of the claims of such Ground 2.

Claims 20-21, 24-27 and 29-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bernard '983 in view of Wyant '065 and Siudzinski '649.

Claim 20: See Claim Language Interpretation section supra hereinafter also referred to as CLI and Figures 7-9, and note the blow-ups of Figure 9 in Appendix A attached to this action, col. 1, line 55-col. 2, line 6, col. 2, lines 14-31 and col. 3, lines 23-43, i.e. the first part/outer layer is the outer layer of 15a, the first part/anchor layer is the inner layer of 15a, the stitching is

17. The outer layer and anchor layers are separate fabrics layers, the former shaped to conform to a buttock and leg region of the user, see Figures, and the latter having a shape conforming to that of the former. The second part/pocketed sling is 53 which includes four sides and is detachably coupled to the anchor layer but not directly detachably coupled to the outer layer, i.e. only indirectly so coupled, by releasable fasteners which are snap fasteners of two portions 51, 52 located respectively on the anchor layer and sling, see blow up in Appendix A, col. 2, line 7 and col. 3, line 21, elements 20-21 as shown in Figure 2, col. 3, lines 31 and 36-41 and elements 20a, 21a, 50-51 as seen in Figures 7-9. The sling extends from the anchor layer on the inner side of the undergarment when the undergarment is worn to form a pocket for retaining a fluid absorbent pad, i.e. diaper D, facing inwardly away from the anchor layer. The sling is displaced inwardly from corresponding sides toward the center of the anchor layer and inwardly from the stitches between the anchor layer and the outer layer at, e.g., 7b, 7c, 8b, and 8c. It is noted that the entire periphery/all portions of all four sides of the sling is/are still not required to be so inwardly displaced from the entire periphery of the anchor layer, i.e. only the fasteners are, see discussion infra. However also note the position of 31 in Figure 3 and the position of 51 and 52 in Figures 7-9 with regard to stitching 17. The outer layer overlies fasteners on the anchor layer, e.g. 20a, 21a, 50 and/or 52. Claim 20 now requires the outer layer completely overlying the releasable fasteners. While the outer layer overlies a portion of the fasteners 51, 20a, 21a which are on the inside thereof and fasteners 52 when the garment is unfastened and overlies completely some fasteners, e.g. 20a, when the garment is fastened, see Figure 1, such layer does not appear to completely overlie the fasteners on the anchor layer. (Note claim 21 further requires the fasteners be filamentary fasteners while '983 teaches cooperating snap fasteners).

However, see '065 at Figure and col. 3, lines 19-23 and '649 at Figure and col. 6, lines 20-22.

To make the cooperating snap fasteners for fastening components of an absorbent undergarment together of '983 cooperating filamentary fasteners, i.e. VELCRO, instead would be obvious to one of ordinary skill in the art in view of the interchangeability as taught by '065 and '649. In so doing the prior art combination also teaches fasteners on the anchor layer which are necessarily and inevitably completely overlaid by the outer layer. Claim 20 now also requires the releasable fasteners on the anchor layer are "displaced" (see CLI supra, i.e. "removed" from or "moved out the position") inwardly from the stitches, i.e. inwardly of the stitches, joining the anchor layer to the outer layer around the entire periphery of the anchor layer and all of the releasable fasteners on such anchor layer and all of the fasteners on the pocketed sling are "displaced" inwardly relative to the stitches, see supra, joining the anchor layer and the outer layer when the pocketed sling is fastened to the anchor layer, i.e. again note the position of 31 in Figure 3 and the position of 51 and 52 in Figures 7-9 with regard to stitching 17. See discussion of dependent claims *infra* and also response to the arguments section *infra* (i.e. "Applicant's remarks have been carefully considered but are either deemed moot in that the issue/rejection addressed has not been reraised or deemed not persuasive for the reasons set forth supra. Specifically, Applicants remarks are not commensurate in scope with the claim language, the teachings of the prior art and/or the rejections thereon as set forth supra, i.e. narrower than the claim language and/or teachings and/or rejections. For example, claim 20, e.g. 'displaced inwardly from the stitches', does not require the fasteners be spaced/spaced a specific distance from the stitches just move or removal therefrom, i.e. can be right next to. For a second example, Applicant's remarks with respect to '983 bridging pages 4-5 are narrower than the teachings thereof and the rejections thereon, see

discussion of layers of 15a and sling 53 in paragraph 5 supra and/or the claim language, see discussion supra and also that the fasteners are claimed in addition to the sling and anchor and outer layers, i.e. not claimed as part thereof, i.e. sling not directly attached to layers rather attached than through such claimed fasteners. For a final example, Applicant's characterization of the '649, '124, '598 and '065 references are narrower than the teachings thereof/prior art rejections relying thereon, i.e. none of the references show/teach the fasteners extending through the layer(s) it is attached to, e.g. a more "outer" layer, i.e. covered completely by such attached layer.").

Although Appellant does not group the other dependent claims of this ground nor other grounds of rejection separately, the rejection of such claims and other grounds of rejection follows:

Claim 21: Claim 21 further requires the fasteners be filamentary fasteners while '983 teaches cooperating snap fasteners. See the discussion of claim 20.

Claim 24: The releasable fasteners 51 on the anchor layer are located only "adjacent", see CLI, opposite ends of the pocketed sling, i.e. located between but only "adjacent" opposite terminal ends, i.e. both lateral and longitudinal, of the sling layer, see Figures 7-9. It is noted that extent of the ends relative to overall longitudinal and lateral extent of the sling has not been set forth.

Claim 25: The releasable fasteners on the anchor layer are located between opposite ends of the pocketed sling, see discussion of claim 24.

Claim 26: The anchor layer is attached to the outer layer “adjacent”, see CLI, opposite ends of the outer layer, see 17 in Figures.

Claim 27: The pocketed sling is attached to the anchor layer “adjacent” to, see CLI, but spaced from the opposite ends of the outer layer where the anchor layer is attached to the outer layer, see discussion of claims supra, i.e. the sling is attached inwardly from corresponding sides toward the center of the anchor layer and inwardly from the stitches between the anchor layer and the outer layer at, e.g., 7b, 7c, 8b, and 8c. Note the position of 31 in Figure 3 and the position of 51 and 52 in Figures 7-9 with regard to stitching 17.

Claim 29: The anchor layer is attached to the outer layer only “adjacent”, see CLI, peripheral edges of the anchor layer and the outer layer, see discussion of claim 26 supra.

Claim 30: The anchor layer is attached to the outer layer around the entire periphery of the anchor layer, i.e. see stitching 17 in Figure 7.

Claim 31: The pocketed sling is attached to the anchor layer inwardly from peripheral edges of the outer layer, i.e. see discussion of claim 20, i.e. the sling layer is displaced inwardly from corresponding sides toward the center of the anchor layer and inwardly from the stitches between the anchor layer and the outer layer at, e.g., 7b, 7c, 8b, and 8c. It is noted that the entire periphery/all portions of all four sides of the sling layer is/are not required to be so inwardly displaced from the entire periphery of the anchor layer. However also note the position of 31 in Figure 3 and the position of 51 and 52 in Figures 7-9 with regard to stitching 17.

Claims 20, 22, 24-27 and 29-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bernard ‘983 in view of Siudzinski ‘649, Thompson ‘124 and Stevens ‘598.

See discussion of claims 20 and 24-27 and 29-31 *supra*. Claim 22 further requires the fasteners be snap fasteners. While '983 teaches cooperating snap fasteners it does not teach such completely overlaid by the outer layer. However, see '649 at Figure 6 (Note the snap fasteners are shown in dotted lines when viewed from the outside) and col. 6, lines 20-22, Thompson '124 at the Figures (Note again the snap fasteners are shown in dotted lines when viewed from the outside) and Stevens '598 at Figures 19A-19C. To make the cooperating snap fasteners for fastening components of an absorbent undergarment together of '983 cooperating snap fasteners which are completely overlaid by an outer layer instead such as, for example, taught by '649, '1243 and '598 would either be obvious in view of *In re Siebentritt*, 54 CCPA 1083, i.e. two equivalents are interchangeable for the desired function, express suggestion of desirability not needed to render such substitution obvious, i.e. here the equivalents are interchangeable for the desired function of cooperative fastening, or be obvious to one of ordinary skill in the art in view of the recognition that such would be more aesthetic and/or safer, e.g. can't catch on anything, and the desirability of such features in any garment. Note also col. 1, lines 20-22 of '983. In so doing, the prior art combination also teaches fasteners on the anchor layer which are necessarily and inevitably completely overlaid by the outer layer.

Claim 34 is rejected under 35 U.S.C. 103(a) as being unpatentable over Bernard '983 in view of Wyant '065 and Siudzinski '649 or Bernard '983 in view of Siudzinski '649, Thompson '124 and Stevens '598 as applied to claim 20 above, and further in view of Alsop '604 and Brownlee '422.

Claim 34, see CLI *supra*, requires a pocket with sides that have been stitched together in some manner and an outer edge having an elastic strip covering it. While '983 teaches a pocket with sides that have been stitched together in some manner, see discussion of claims *supra* and stitching in Figure 8, it does not teach an outer edge of the pocket having an elastic strip covering it. However, it is well known, see, e.g. '604 and '422, to employ an elastic strip covering some surface of a portion of the outer edge, e.g. 31 in Figure 6a of '604 or col. 2, lines 41-45 and Figures of '422, of an pocket in order to better fit such edge to the wearer promoting better liquid/fluid containment or leakage prevention and the desirability of such containment in any diaper garment.

(10) Response to Argument

Ground 1:

Claims 20-22, 24-27, 29-31 and 34 are treated as a Group by Appellant (Note 37 CFR 41.37(c)(1)(vii), i.e. any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Claim 20 is considered to be representative of such claims.

Appellant's remarks on page 9 of the Brief, first full paragraph have been considered but are deemed not persuasive since line 13 does not provided basis for "the stitches joining...around the entire periphery of the anchor layer" (Emphasis added).

Therefore the rejection of claims 20-22, 24-27, 29-31 and 34 under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention is deemed proper and maintained.

Grounds 2-5:

Grounds 2-5, see page 8 of the Brief, second to fifth full paragraphs, as well as the claims of all such Grounds are treated as a Group by Appellant, see page 9 of Brief (Note 37 CFR 41.37(c)(1)(vii), i.e. Each ground of rejection must be treated under a separate heading. Any claim argued separately should be placed under a subheading identifying the claim by number. Claims argued as a group should be placed under a subheading identifying the claims by number). Ground 2 is considered to be representative of such respective grounds of rejection and claim 20 is considered to be representative of the claims of such Ground 2.

Appellant's remarks on page 9, line 11-page 12, line 23 and page 14, first three full paragraphs with regard to claim 20 have been carefully considered but are deemed not persuasive. Specifically, Applicants remarks are not commensurate in scope with the claim language, the teachings of the prior art and/or the rejections thereon as set forth supra, i.e. narrower than the claim language and/or teachings and/or rejections.

First, as set forth by Appellant in the paragraph bridging pages 11-12, the arguments with regard to claim 20 are discussed solely with regard to only the '983 reference. However, the claim was not rejected on the '983 reference only or in view of such and only one other reference

solely but in view of a combination of references, i.e. at least two other references. For a second example, Applicant's remarks with respect to '983 alone bridging pages 9-11 are narrower than the teachings thereof and the rejections thereon. More specifically, with regard to the paragraph bridging pages 9-10, such arguments are narrower than, e.g., Figure 7, i.e. the stitching, Figures 2-3, i.e. the stitching, and col. 3, lines 23-25 of '983. Specifically with regard to the first full paragraph of page 10 and the paragraph bridging pages 10-11, such arguments are narrower than Figure 9 (Note Appendix A and the cross hatching of the bottom two layers, i.e. 15a, are the same but both are different than the cross hatching of the top layer, i.e. 16a, and col. 3, lines 32-34 of '983. With regard to the first full paragraph on page 11, such argument is narrower than the Office action which did not stipulate the dashed lines indicated two layers. Appellant's remarks in the second full paragraph of page 11 are narrower than the claim language and the teachings of '983, i.e. see again layers of 15a and sling 53 and also that the fasteners are claimed in addition to the sling and anchor and outer layers, i.e. not claimed as part thereof, i.e. sling not directly attached to layers rather attached than through such claimed fasteners, e.g., 51, 52 (It is noted that Appellant does not specifically point out how the configuration of the fasteners differs as argued in the last full paragraph of page 11.) Applicant's remarks with regard to '649 and '065 references on page 12, first full paragraph are narrower than the teachings thereof/prior art rejections relying thereon, i.e. none of the references show/teach the fasteners and/or stitching extending through/exposed on the layer(s) it is attached to, e.g. a more "outer" layer, i.e. covered completely by such attached layer, i.e. the prior art combination contemplates VELCRO fasteners sandwiched between the layers, i.e., 15a and 16a. For another example, with regard to Appellant's remarks on page 14, first third full paragraphs, claim 20, e.g. "displaced inwardly

from the stitches”, does not require the fasteners be spaced/spaced a specific distance from the stitches just move or removal therefrom, i.e. can be right next to. For a final example, Appellant’s remarks in the third full paragraph of page 14 are also narrower than the claim language because the claim does not claim the sling is not attachable to the outer layer or that all the fasteners are spaced from the outer layer. Furthermore it is noted that the ‘649 reference is not applied alone, but is applied as a combination of references which combination is not addressed with regard to such spacing other than in a broad conclusive manner in the second to last sentence of such third paragraph.

Appellant’s arguments other than those discussed supra address claims and/or grounds other than claim 20 and Ground 2.

Therefore, the rejection of claims 20-21, 24-27 and 29-31 under 35 U.S.C. 103(a) as being unpatentable over Bernard ‘983 in view of Wyant ‘065 and Siudzinski ‘649, claims 20, 22, 24-27 and 29-31 under 35 U.S.C. 103(a) as being unpatentable over Bernard ‘983 in view of Siudzinski ‘649, Thompson ‘124 and Stevens ‘598 and Claim 34 under 35 U.S.C. 103(a) as being unpatentable over Bernard ‘983 in view of Wyant ‘065 and Siudzinski ‘649 or Bernard ‘983 in view of Siudzinski ‘649, Thompson ‘124 and Stevens ‘598 as applied to claim 20 above, and further in view of Alsop ‘604 and Brownlee ‘422 is deemed proper and maintained.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

Art Unit: 3761

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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Appendix A

FIG. 9.



